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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92047135
Party	Defendant GGW Marketing, LLC GGW Marketing, LLC 1005 APOLLO WAY INCLINE VILLAGE, NV 89451
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Submission	Motion to Dismiss - Rule 12(b)
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Attachments	Reply in Support of Motion to Dismiss-alloutof.PDF (6 pages)(231565 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ALLOUTOF, INC.,

Petitioner,

v.

GGW MARKETING, LLC,

Respondent.

Cancellation No. **92047135**

Registration No. 2,611,100

Mark: BANNED FROM
TELEVISION

Registration Date: August 27, 2002

**RESPONDENT GGW MARKETING, LLC'S REPLY IN SUPPORT OF MOTION TO
DISMISS THE PETITION TO CANCEL AND EVIDENTIARY OBJECTIONS TO
DECLARATION OF CARLOS REIS**

I. INTRODUCTION

Petitioner Alloutof, Inc. ("Alloutof") is a suspended California corporation. Alloutof has not been revived. Alloutof remains without standing or capacity to file the present Petition. California and Federal law are clear: lacking capacity to sue, Alloutof is disabled from attacking Respondent GGW Marketing's registration of the mark BANNED FROM TELEVISION. The fact that Alloutof, alerted to its disability by GGW Marketing's Motion to Dismiss, only then allegedly sought to revive its good standing in order to rescue its Petition cannot cure its disability, which arose long before the filing of the present Petition and, indeed, long before Alloutof filed its pending applications. Alloutof has offered no competent evidence of revivor under California's Revenue and Taxation Code. Its mere statements of intention are not sufficient to prevent dismissal of the Petition.

Accordingly, Alloutof should not be accorded the rights and privileges of corporations in good standing and GGW Marketing's Motion to Dismiss should be granted.

II. ARGUMENT

A. ALLOUTOF ADMITS THAT IT WAS NOT IN GOOD STANDING AT THE TIME IT FILED THE PETITION TO CANCEL.

Alloutof admits that it is a suspended California corporation for failure to pay the franchise tax for two years, 2004 and 2005. Declaration of Carlos Reis ¶4 ("Reis Decl.") The plain language of the code "expressly deprives a suspended corporation" of the rights and privileges of a corporation in good standing during the pendency of the suspension. *Timberline, Inc. v. Jaisinghani*, 54 Cal. App. 4th 1361, 1362 (2d Dist. 1997). "[A] suspended corporation is disqualified from exercising any right, power or privilege," including prosecuting or defending an action. *Id.* at 1365. Alloutof was suspended at the time its filed the present Petition. Its ignorance of its suspended status does not cure its lack of capacity under governing California law to file the Petition. The filing of the Petition was, consequently, an unauthorized act. Failure to dismiss the cancellation proceeding is error. *Id.* at 1366-67.

Moreover, Alloutof does not cite any authority supporting its position that alleged attempts to revive its good standing after the fact are sufficient to cure its lack of capacity to file the Petition. If mere statements and allegations about revivor were a sufficient cure, there would be no reason for the rule. This cannot be what the California law intended. *See id.* at 1368 (stating that rights and privileges are reserved to corporations in good standing); *see also Galen Med. Assoc., Inc. v. United States*, 74 Fed. Cl. 377, 382 (Ct. Cl. 2006) ("[A]ny action taken by a suspended corporation during the time of the suspension is beyond the powers of the corporation, i.e. ultra vires." (emphasis in original))

Alloutof has the burden of showing that it was in good standing at the time it filed the Petition. It cannot meet and has not met this burden because it was not in good standing and has not been revived.

B. ALLOUTOF HAS NEITHER STANDING NOR CAPACITY TO FILE THE PENDING APPLICATIONS OR THE PETITION.

For the reasons set forth above, Alloutof's applications to register the BANNED Marks (upon which Alloutof relies in the Petition) are invalid because they were filed in the name of the corporation during the suspension and, therefore, should be invalidated. Even if, *arguendo*, Alloutof is the alleged senior user of the BANNED Marks, that does not permit Alloutof to file or maintain applications during its suspension. Even if, *arguendo*, Alloutof intended to base its Petition on an alleged prior use of the BANNED Marks (which is not a statutory basis for cancellation), it cannot file a Petition during its suspension. Thus, Alloutof has neither standing nor capacity to file the Petition and, on that basis, the Petition must be dismissed. Alloutof should not be accorded rights and privileges that it forfeited during its suspension merely because it claims that its accountant failed to advise it to pay its taxes. To rule otherwise is to nullify the consequences of suspension and place Alloutof on a par with corporations in good standing, something that it cannot legally do.

III. EVIDENTIARY OBJECTIONS TO REIS DECLARATION

GGW Marketing objects to the Reis Declaration on the following evidentiary grounds.

1. The Reis Declaration lacks competence (§§2-4) (Fed. R. Ev. 104).
2. The Reis Declaration is irrelevant (§§3-5) (Fed. R. Ev. 401).
3. The Reis Declaration relies on hearsay (§§2-4) (Fed. R. Ev. 801, 802).

IV. CONCLUSION

For the foregoing reasons, Respondent GGW Marketing respectfully moves the Board to dismiss the Petition to Cancel and to terminate the cancellation proceeding.

DATED: May 14, 2007

Respectfully submitted,

By: /J. Alison Grabell/

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Venable, LLP 2049 Century Park East, Suite 2100, Los Angeles, California.

On May 14, 2007, I served the foregoing document(s) described as:

**RESPONDENT GGW MARKETING, LLC'S REPLY IN SUPPORT OF
MOTION TO DISMISS THE PETITION TO CANCEL AND
EVIDENTIARY OBJECTIONS TO DECLARATION OF CARLOS REIS**

on the interested parties in this action addressed as follows:

Attorney for Petitioner Alloutof, Inc.

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☒ By placing true copies thereof enclosed in a sealed envelope(s) addressed as stated above.

☐ **BY PERSONAL SERVICE:** I delivered such envelope(s) by hand to the addressee(s) as stated above.

☒ **BY MAIL:** I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the U.S. Postal Service. Under that practice such envelope(s) is deposited with the U.S. postal service on the same day this declaration was executed, with postage thereon fully prepaid at 2049 Century Park East, Suite 2100, Los Angeles, California, in the ordinary course of business.

☐ **BY OVERNIGHT DELIVERY:** I am readily familiar with the firm's practice of collection and processing items for delivery with Overnight Delivery. Under that practice such envelope(s) is deposited at a facility regularly maintained by Overnight Delivery or delivered to an authorized courier or driver authorized by Overnight Delivery to receive such envelope(s), on the same day this declaration was executed, with delivery fees fully provided for at 2049 Century Park East, Suite 2100, Los Angeles, California, in the ordinary course of business.

☐ **BY E-MAIL:** By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth above.

Executed on May 14, 2007 at Los Angeles, California

☐ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☒ **(FEDERAL)** I declare that I am employed in the office of a member of the Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.


Suzanne Hodel